SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 450

ROBERT L. DOUGLAS, ALBERT R. GUNDECKER, EARL KALKBRENNER, CARROL CHRISTOPHER, VICTOR SWANSON, NICHOLAS KODA, CHARLES SEDERS, ROBERT LAMBORN and ROBERT MURDOCK, JR.
Petitioners

v.

CITY OF JEANETTE (Pennsylvania), a municipal corporation, and JOHN M. O'CONNELL, individually and as Mayor of City of Jeannette, (Pennsylvania)
Respondents

ON CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners' MOTION FOR REHEARING

HAYDEN C. COVINGTON
Attorney for Petitioners

INDEX

Subject Index

	PAGE
Caption	*Front Cover*
THIS INDEX	i-viii
Petitioners' MOTION FOR REHEARING	1
Grounds	2
Supporting ARGUMENT	3-31
Certificate of Petitioners' Attorney	31

Cases Cited

Adams v. Tanner 244 U. S. 590	19
Aetna Life Insurance Co. v. Haworth 300 U. S. 227, 240	4
Allen v. Regents of U. System of Georgia 304 U. S. 439	11
American Life Ins. Co. v. Stewart 300 U. S. 203, 214-216	25, 27
Ashwander v. Tenn. Valley Authority 297 U. S. 288	11
Atlas Insurance Co. v. Southern Inc. 306 U. S. 563, 569	27
Barnette v. West Virginia State B'd of Educ'n 47 F. Supp. 251	18, 21
Beal v. Missouri Pac. Ry. Co. 312 U. S. 45	14
Beeler v. Smith et al. 40 F. Supp. 139	18

Cases Cited

	PAGE
Bemis Bros. Bag Co. v. Feidelson 13 F. Supp. 153	7
Black v. Little 8 F. Supp. 867	6
Borchert v. Ranger et al. 42 F. Supp. 577	18, 21
Bowie v. Gonzales 117 F. 2d 11	11
Bransford, Ex parte 310 U. S. 354, 361	19
Cantwell v. Connecticut 310 U. S. 296	18
Cincinnati v. Cincinnati & H. Traction Co. 245 U. S. 446	3
Citizens Bank v. Cannon 164 U. S. 319	30
Cline v. Frink Dairy Co. 274 U. S. 445	17, 19, 28
Colorado v. Toll 268 U. S. 228, 230	19, 21
Colorado Nat'l Bank of Denver v. Bedford 310 U. S. 41	11
Commodity Credit Corp. v. County of Oklahoma 36 F. Supp. 694	11
Concordia Fire Ins. Co. v. Illinois 292 U. S. 535, 545	21
Consolidation Coal Co. v. Martin 113 F. 2d 813	11
Currin v. Wallace 306 U. S. 1, 95 F. 2d 856	7, 11
Curry v. McCanless 307 U. S. 357	10
Daines v. Board of Public Works 91 U. S. 380	3

PAGE

Dallas v. City of Atlantic City (unreported)
USDC-NJ, injunction granted October 11, 1940 18
Dartmouth Woolen Mills v. Myers
15 F. Supp. 751 7
Dearborn Publishing Co. v. Fitzgerald
271 F. 479 ..... 17, 20
Denver v. Denver Union Water Co.
246 U. S. 178 3
DiGiovanni v. Camden Fire Ins. Assn.
296 U. S. 64, 69 27
Dobbins v. Los Angeles
195 U. S. 233, 241 19
Donley v. City of Colorado Springs
40 F. Supp. 15 18
Dorchy v. Kansas
264 U. S. 286 3
Electric Bond & Share Co. v. S. E. C.
303 U. S. 419 11
Fidelity & Deposit Co. v. Tafoya
270 U. S. 426, 434 ..... 19, 23
Fosgate v. Kirkland
19 F. Supp. 152 ..... 5, 11
Fresno County v. Commodity Credit Corp.
112 F. 2d 639 11
Gebelein, John A., Inc. v. Melbourne
12 F. Supp. 105 11
Great Lakes Dredge & Dock Co. v. Charlet
No. 849, October Term 1942 30
Green v. Louisville & I. Ry. Co.
244 U. S. 499, 506-508, 520-521 ..... 19, 21
Grosjean v. American Press Co.
297 U. S. 233 19
Group Health Ass'n v. Moor,
24 F. Supp. 445 11

PAGE

Gulley v. Interstate Natural Gas Co.
292 U. S. 16 3
Gulley v. Interstate Natural Gas Co.
82 F. 2d 145, 149 ..... 5, 11
Hague v. C. I. O.
101 F. 2d 774, 307 U. S. 496 ..... 14, 16, 19, 24
Harr v. Pioneer Mechanical Corp
65 F. 2d 332, 335 5
Imperial Irr. Dist. v. Nevada-Calif. Elec. Corp.
111 F. 2d 319 6
Jamison v. Texas
318 U. S. ...., 63 S. Ct. 699 30
Johnson v. Deerfield
25 F. Supp. 918 10
Johnson v. Wells Fargo
239 U. S. 234 20
Kennedy v. City of Moscow (Idaho)
39 F. Supp. 26 18
Kennington v. Palmer
255 U. S. 100 19
Lee v. Bicknell
292 U. S. 415 23
Lovell v. Griffin
303 U. S. 444 18
Ludwig v. Western Union
216 U. S. 146 19
Lukens Steel Co. v. Perkins
107 F. 2d 627 6
Lynch v. Muskogee (Okla.)
47 F. Supp. 589 21
Mayo v. Lakeland Highland Canning Co.
309 U. S. 310 3
Mickey v. City of Excelsior Springs (unreported)
USDC-SD-Mo., injunction granted January 9, 1941 18

PAGE

Minnesota v. National Tea Co.
309 U. S. 551 3
Montejano v. Rayner
33 F. Supp. 435 ..... 6, 10
Moore v. Fidelity & Deposit Co.
272 U. S. 317 19
Morgan v. Daniels
153 U. S. 120 29
Nashville C. & St. L. Ry. Co. v. McConnell
82 F. 65, 70 ..... 17, 20
Nashville C. & St. L. Ry. Co. v. Wallace
288 U. S. 249 ..... 4, 5
New Hampshire Gas & Elec. Co. v. Morse
42 F. 2d 90-93 26
Oney v. Oklahoma City
120 F. 2d 861 ..... 18, 21
Osborn v. Bank of the United States
9 Wheat. 738 11
Pan American Petroleum Co. v. Chase Nat'l Bank
83 F. 2d 447 6
Patterson v. Alabama
294 U. S. 600 4
Patterson v. Mobile Gas Co.
271 U. S. 131 ..... 3, 4
Penn v. Glenn
10 F. Supp. 483 ..... 6, 11
Petroleum Exploration Inc. v. Pub. Serv. Comm.
304 U. S. 209 ..... 24, 25, 27
Pierce v. Society of Sisters
268 U. S. 510, 535-536 ..... 13, 19, 28, 30
Poindexter v. Greenhow
114 U. S. 270 11
Publix Cleaners v. Florida Dry Cl. & L'dry B'd
32 F. Supp. 31 ..... 7, 10

PAGE

Railroad & W'house Comm. v. Duluth St. Ry.
273 U. S. 625, 628 25
Reid v. Borough of Brookville (Pa.)
39 F. Supp. 30 18
Risty v. Chicago RI&P Ry. Co.
270 U. S. 378, 388 ..... 25, 27
Roberts v. City of Hot Springs (unreported)
USDC-WD-Ark., injunction granted May 8, 1941 .. 18
Roe v. City of North Little Rock (unreported)
USDC-ED-Ark., injunction granted
January 27, 1941 18
Rogers v. United States
141 U. S. 548 29
Roloff v. Purdue
31 F. Supp. 739, 33 F. Supp. 513 ..... 7, 11
Sancho v. Humacao Shipping Corp.
108 F. 2d 157 11
Santa Fe County v. New Mexico
215 U. S. 296 4
Schneider v. Irvington (N. J.)
308 U. S. 147 18
Smyth v. Ames
169 U. S. 466, 516, 517 25
Southern Pacific Co. v. Conway
115 F. 2d 746 ..... 10, 11
Spielman Motor Co. v. Dodge
295 U. S. 95 ..... 14, 15
Starr v. Schram
24 F. Supp. 888 10
Stephenson v. Equitable Life Assurance Soc.
92 F. 2d 406, 408 6
Sterling v. Constantin
287 U. S. 378, 393, 403-404 ..... 19, 21, 22

PAGE

Stfatton v. St. L. & S. W. Ry. Co.
284 U. S. 530, 534 25
Swift & Co. v. United States
276 U. S. 311 19
Terrace v. Thompson
263 U. S. 197 ..... 19, 24, 25
Texas v. Anderson, Clayton & Co.
92 F. 2d 104 10
Texas v. Florida
306 U. S. 398 ..... 5, 11
Thompson v. Louisiana
98 F. 2d 109 11
Truax v. Raich
239 U. S. 33, 219 F. 273 19
United States v. De Morant
124 U. S. 647 4
United States v. Query
37 F. Supp. 972 11
United States v. Rio Grande Dam & Irrig. Co.
184 U. S. 416 3
United States v. Standard Oil Co.
21 F. Supp. 645 10
United States v. West Virginia
295 U. S. 463 11
Vicksburg Waterworks v. Vicksburg
185 U. S. 65, 82 19
Vogt & Sons v. Rothensies
11 F. Supp. 225 6
Wallace v. Hudson-Duncan & Co.
98 F. 2d 985 11
Watts W. & Co. v. Unione Austriaca de Navigazione
248 U. S. 9 3
Western Union Tel. Co. v. Andrews
216 U. S. 165 19

Cases Cited

PAGE

Widle v. City of Harrison (unreported)
USDC-WD-Ark., injunction granted
January 9, 1941 18

Work v. Louisiana
269 U. S. 250, 254 19

Wright v. Central Kentucky Nat. Gas Co.
207 U. S. 537 10

Young, Ex parte
209 U. S. 123 ..... 11, 19

Zimmermann v. Village of London (Ohio)
38 F. Supp. 582 18

Statutes Cited

Federal Declaratory Judgment Act 4, 7

Judicial Code, United States
Section 24(14) 4, 14, 16, 23
Section 274(d) 2, 3

United States Code
Title 28, section 41(14) 4, 14, 16, 23
Title 28, Sec. 400 ..... 2, 3

United States Code Annotated
Title 8, Section 43 13

Miscellaneous Citations

Borchard, *Declaratory Judgments*
Second Edition, 1941 ..... 5, 7-10, 11

Report of House Committee on the Judiciary
73rd Congress, 2d Sess. Report No. 1264 11

United States District Court, Rules of, Rule No. 57 .. 7

University of Chicago, Law School Conferences on
Public Law, June 12-13, 1939, p. 38 9

Yankwich (USDJ), *Declaratory Judgments Under the New Rules of Civil Procedure*, an address before
Judicial Conference 9th Circuit, July 5-8, 1940 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 450

ROBERT L. DOUGLAS, ALBERT R. GUNDECKER, EARL KALKBRENNER, CARROL CHRISTOPHER, VICTOR SWANSON, NICHOLAS KODA, CHARLES SEDERS, ROBERT LAMBORN and ROBERT MURDOCK, JR.
Petitioners

v.

CITY OF JEANNETTE (Pennsylvania), a municipal corporation, and JOHN M. O'CONNELL, individually and as Mayor of City of Jeannette, (Pennsylvania)
Respondents

ON CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners' MOTION FOR REHEARING

MAY IT PLEASE THE COURT:

Now come petitioners in the above cause and present this their motion for rehearing within the time prescribed by the rules of the Court and, as grounds therefor, show:

Grounds

ONE

This Court erred in affirming the judgment of the Circuit Court of Appeals ordering the complaint dismissed by the District Court because the Court should have reversed the judgment of the Circuit Court of Appeals and modified the judgment of the District Court so as to permit the judgment of the District Court declaring the ordinance unconstitutional to stand under the *declaratory judgment statute* [Judicial Code Section 274 (d), 28 U. S. C. 400], and affirm the judgment of the District Court as modified, inasmuch as it is the duty of this Court, upon an appeal in equity, to render such decree as would have been proper for the District Court to render, especially in view of the fact that the ground of reversal was objected to by the Supreme Court of the United States *on its own motion* at the oral argument without an opportunity for counsel to be fully heard.

TWO

This Court erred in affirming the judgment of the Circuit Court of Appeals and ordering the complaint dismissed because the pleadings and evidence showed extraordinary circumstances of great, immediate, irreparable injury and loss from respondents' actions under color of the ordinance so as to require granting of the injunction sought to redress deprivation of rights secured by the Federal Constitution pursuant to the Civil Rights Act.

ARGUMENT

ONE

This Court erred in affirming the judgment of the Circuit Court of Appeals ordering the complaint dismissed by the District Court because the Court should have reversed the judgment of the Circuit Court of Appeals and modified the judgment of the District Court so as to permit the judgment of the District Court declaring the ordinance unconstitutional to stand under the *declaratory judgment statute* [Judicial Code Section 274 (d), 28 U. S. C. 400], and affirm the judgment of the District Court as modified, inasmuch as it is the duty of this Court, upon an appeal in equity, to render such decree as would have been proper for the District Court to render, especially in view of the fact that the ground of reversal was objected to by the Supreme Court of the United States *on its own motion* at the oral argument without an opportunity for counsel to be fully heard.

Upon an appeal in equity, the whole case is before the Court and this appellate Court can render in equity such a decree as under all of the circumstances was proper to be rendered and which should have been rendered by the District Court under all of the facts and circumstances.[1] In other words, this Court in the exercise of its appellate

[1] *United States* v. *Rio Grande Dam & Irrig. Co.*, 184 U. S. 416; *Dorchy* v. *Kansas*, 264 U. S. 286; *Watts W. & Co.* v. *Unione Austriaca de Navigazione*, 248 U. S. 9; *Patterson* v. *Mobile Gas Co.*, 271 U. S. 131; *Dainese* v. *Board of Public Works*, 91 U. S. 580; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178; *Cincinnati* v. *Cincinnati & H. Traction Co.*, 245 U. S. 446; *Gulley* v. *Interstate Nat. Gas Co.*, 292 U. S. 16; *Mayo* v. *Lakeland Highland Canning Co.*, 309 U. S. 310; *Minnesota* v. *National Tea Co.*, 309 U. S. 551.

jurisdiction has power, not only to correct error in the judgment under review but also, to make such disposition of the case as justice and fairness to all the parties requires.[2]

In the case of *Patterson* v. *Mobile Gas Co.*, supra, this Court held that upon an appeal from an order enjoining the Public Service Commission from enforcing a confiscatory rate upon a gas company the Court may eliminate such provisions of the decree as are improvident and go materially beyond what the circumstances require, whether or not it announces correct conclusions of law.

Therefore the proper thing for this Court to do is to modify the judgment of the trial court eliminating the provision granting the injunction and to affirm that part of the judgment which declares the ordinance unconstitutional. This Court has held that the trial court had jurisdiction to entertain the controversy. There was presented under the declaratory judgment statute a justiciable controversy.

In *Nashville C. & St. L. Ry* v. *Wallace*, 288 U. S. 249, 259, this Court fully sustained the declaratory judgment procedure as a proper method of disposing of a controversy within the exercise of the judicial power of the district courts. Although that case involved the declaratory judgment statute of Tennessee, nevertheless this Court, in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240, affirmed this doctrine as to the Federal Declaratory Judgment Act.

The Federal Declaratory Judgment Act is merely a procedural statute which provides an additional remedy available in respect to justiciable controversies of which the Federal Courts otherwise have jurisdiction. The trial court had jurisdiction under and by virtue of the Civil Rights Act and Section 24 (14) of the Judicial Code. It is therefore available to petitioners.

[2] *Patterson* v. *Alabama*, 294 U. S. 600; *United States* v. *De Morant*, 124 U. S. 647; *Santa Fe County* v. *New Mexico*, 215 U. S. 296.

Petitioners requested the court to enter a declaratory judgment. In the complaint it is alleged, to wit, "Plaintiffs further pray that upon a final hearing this Court enter an order declaring said above described ordinance invalid and void under the Fourteenth Amendment to the Federal Constitution to which said ordinance is contrary and repugnant as contrued and applied to plaintiffs' activities, and also declaring said ordinance void on its face because of vagueness and indefiniteness, and because it has been so construed and applied and will be so construed and applied by defendants to deprive plaintiffs and other of Jehovah's witnesses of their right to exercise and enjoy freedom to worship ALMIGHTY GOD in accordance with the dictates of conscience, and their 'civil rights' of freedom of speech, of press and of assembly." R. 14.

It was not necessary to specifically mention the Declaratory Judgment Act as the facts alleged in the complaint were sufficient to invoke it. In this connection see *Harr* v. *Pioneer Mechanical Corp'n*, 65 F. 2d 332, 335 (CCA-2d), where it was held that it was improper to dismiss a suit where facts alleged showed an *actual controversy* under the Declaratory Judgment Act. There the court said:

> ". . . We think it was error to dismiss the bill for want of jurisdiction over what was called an action for declaratory judgment. The name given to the relief is of no particular moment. The controversy is clearly adverse and over matters which are justiciable in a District Court."

See also *Declaratory Judgments* (Borchard, 2d Ed. 1941), pages 764-767, 771-772, 780, 788-792, 1020-1022; *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace*, 288 U. S. 249, 264; *Texas* v. *Florida*, 306 U. S. 398; *Gulley* v. *Interstate Natural Gas Co.*, 82 F. 2d 145, 149; *Fosgate* v. *Kirkland*, 19 F. Supp. 152; *Stephenson* v. *Equitable Life*

Assur. Soc'y, 92 F. 2d 406, 408; *Pan American Petroleum Co. v. Chase National Bank*, 83 F. 2d 447.

These cases specifically hold that it is properly within the power of the federal courts to enter a declaratory judgment with respect to a state penal statute.

See also the enlightening article "Declaratory Judgment Under the New Rules of Civil Procedure" by Hon. Leon R. Yankwich, United States District Judge, Southern District of California, before Judicial Conference of Ninth Circuit at San Francisco, July 5-8, 1940, appearing in Federal Rules Decisions, Vol. 1, pages 295 et seq., citing cases holding that declaratory judgment jurisdiction should be generously exercised when construction of a penal or other state or federal statute is questioned by the citizen or official.

Since approval of the above mentioned Declaratory Judgment Act, Federal courts have repeatedly granted declaratory judgments, defining the rights of litigants with respect to constitutionality of legislative enactments. See

Lukens Steel Co. v. Perkins,
107 F. 2d 627
Imperial Irr. Dist. v. Nevada-Calif. Elec. Corp.,
111 F. 2d 319
Black v. Little,
8 F. Supp. 867
Penn v. Glenn,
10 F. Supp. 483
Vogt & Sons v. Rothensies,
11 F. Supp. 225
Montejano v. Rayner,
33 F. Supp. 435

Ordinances relating to sale of certain commodities and controlling *competition* in certain types of business have been subjects of declaratory judgments in Federal courts.

Publix Cleaners v. Florida Dry Cleaning & Laundry Bd., 32 F. Supp. 31 (SD Fla. 1940)
Roloff v. Purdue, 31 F. Supp. 739 (ND Iowa); 33 F. Supp. 513 (1940)
Currin v. Wallace, 306 U. S. 1; 95 F. 2d 856
Bemis Bros. Bag Co. v. Feidelson, 13 F. Supp. 153 (WD Tenn. 1936)
Dartmouth Woolen Mills v. Myers, 15 F. Supp. 751 (N. H. 1936)

It is noticed that in the Declaratory Judgment Act it is said: " . . . the courts . . . shall have power . . . to declare rights and other legal relations . . . whether or not further relief is or could be prayed."

Rule 57 of the *District Court Rules* among other things says: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

In Borchard, *Declaratory Judgments*, supra, it is said:

> "Constitutionality and validity being conceded, the construction and interpretation of statutes and ordinances and the question of their application to the plaintiff is a common quest of declaratory action. [Pages 788-789]
>
> "Far more interesting are the cases in which the plaintiff, threatened with criminal penality, tort liability, money payments, losses, or other risk of undesirable consequences, demands the construction or interpretation of the statute to the end of establishing his privilege or freedom from the threatened sanction. Thus, plaintiffs have sought declarations of their privilege to conduct a certain business or enterprise

free from the supposed restrictions of a statute or declarations that the statute did not make unlawful what they were undertaking to do; [citing cases] that they were either entitled to receive a license or permit or that their business required none; [citing cases] that they were free to sell or export free from official control, either because the statute was not observed [citing cases] or that the statute, properly construed, had no application to the plaintiff's business, either because it was not in force or because it was not intended to apply to the subject or object of the business in question and that the act, either by place, time, or circumstance, was privileged. [citing cases] [Pages 791-792]

"The criminal prosecution is at best a crude weapon of social control. While it may be the only instrument available to punish and exercise, if possible, the major offenses against society, it is quite unsuited to the more subtle adjustments of competition, business practice and regulation which mark the impact of modern industry and business on all classes of society. What is here needed is not the policeman's club but the arbitrator's and traffic manger's refinement and direction of legislative correctives in the light of social need. The criminal trial is hardly the forum for making such adjustments, and for arguing out the shadowy and movable line between the permissible and the unprivileged practice. Where nearly every administrative regulation or prohibition is accompanied by the sanction of a criminal penalty, when not enforced by permit, license or fine, it is possible to contrue it as a criminal or a civil control and it becomes a question of policy whether the interpretation of its usually broad terms should be committed to a criminal or a civil trial. This chapter [III] will be devoted to demonstrating, as many cases have already shown, the

social and individual advantage of substituting for the obloquy and humiliation of a public criminal prosecution and trial the more civilized forum of a suit for a declaratory judgment, under safeguarding conditions, on the issues arising between the administration and the citizen, to determine the validity of a statute, ordinance or regulation, and, if valid, the legitimacy and proper limits of a business practice affected by its terms.

"Business men, harassed by the enactment of new legislation and the threat of a district attorney that their conduct of their business violates the law and exposes them to criminal penalty, are faced with the alternative (a) of desisting from their challenged business or practice, (b) of a criminal trial, or (c) of an attempt to restrain the district attorney by injunction. Since injunctions are granted under limited circumstances only and not without reluctance against public officials, especially prosecuting attorneys, the business man's choice is practically limited to desisting or submitting to trial.

"This dilemma is likely to become more common as statutory police power and administrative commission continue to encroach upon and to control and govern the conduct of business.

"Yet, as has often been said, business men do not want to violate the law, with its penalties. What they wish is a clarification, a guide to the meaning of the law, so that they may avoid breaking it. Thurman Arnold has affirmed that in the enforcement of the anti-trust laws he conceives himself as a director of traffic, not a prosecutor of criminals.[3] The question then is whether clarification can best be obtained in a criminal prosecution or in a civil proceeding, by de-

[3] U. of Chicago, Law School Conferences on Public Law, June 12-13, 1939, p. 38.

claratory action. To say that equity will not restrain a criminal prosecution or interfere with the enforcement of the criminal law is merely to dodge the issue. We have seen in the federal administration of tax and customs laws, alcohol and other advertising, agreements in alleged restraint of trade, business which claims exemption from registration under the Securities and Exchange Commission and other regulatory commissions, a practice is growing to promulgate declaratory administrative opinions or rulings, with more or less conclusive effect, which shall at least afford a guide to business conduct, present or prospective.

"The substitution of the civil for the criminal forum in the adjudication of the validity of administrative controls and the legitimacy of business practices requires the making of a distinction between (a) an offense involving moral turpitude, *malum in se*, where there is little or no question of what the criminal law prohibits, and (b) business conducted by responsible men, subject to the continuing regulations and prohibitions, statutory and administrative, of a public control sanctioned by criminal penalty, at most *malum prohibitum*, where there is grave uncertainty as to what practices the general terms of a law prohibit." [Pages 1020-1021]

Since the adoption of the federal act, many proceedings against state and federal officers seeking declarations of constitutionality, both of state[4] and of federal[5] statutes,

[4] See *Wright* v. *Central Ky. Nat. Gas Co.*, 207 U. S. 537; *Curry* v. *McCandless*, 307 U. S. 357; *Sou. Pac. Co.* v. *Conway*, 115 F. 2d 746 (CCA 9); *Johnson* v. *Deerfield*, 25 F. Supp. 918 (D. Mass.); *Montejano* v. *Rayner*, supra; *Publix Cleaners* v. *Florida Dry Cleaning & Laundry Board*, supra; *Starr* v. *Schram*, 24 F. Supp. 888 (E. D. Mich.); *State of Texas* v. *Anderson-Clayton & Co.*, 92 F. 2d 104 (CCA 5); *United States* v. *Standard Oil Co.*, 21 F. Supp. 645 (S. C. Cal.). [5 See next page]

and of the validity of state taxes,[6] have been decided both by this Court,[7] and by inferior federal courts,[8] where the essentials of a justiciable controversy were presented to the Court.[9] Indeed, the Committee Reports indicate that the Congress expected litigation respecting the constitutionality of legislation to be one of the uses to which the declaratory judgment procedure would be put.[10]

The device of a suit against a state officer to test the constitutionality of a state statute is perhaps the most characteristic feature of American constitutional law[11], and, indeed, seems specifically to have been contemplated by the Congress in the adoption of the Declaratory Judgments Act.[12]

[5] *Currin* v. *Wallace*, supra; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288; *Bowie* v. *Gonzales*, 117 F. 2d 11 (CCA 1); *Fosgate Co.* v. *Kirkland*, supra; *Fresno County* v. *Commodity Credit Corp.*, 112 F. 2d 639 (CCA 9); *John A. Gebelein Inc.* v. *Melbourne*, 12 F. Supp. 105 (D. Md.); *Group Health Assn.* v. *Moor*, 24 F. Supp. 445 (D. C. Dist. Co.); *Penn* v. *Glenn*, 10 F. Supp. 483 (W. D. Ky.); *Roloff* v. *Perdue*, supra; *Wallace* v. *Hudson-Duncan & Co.*, 98 F. 2d 985 (CCA 9).

[6] *Texas* v. *Florida*, 306 U. S. 398; *Colorado Nat. Bank of Denver* v. *Bedford*, 310 U. S. 41; see also *Allen* v. *Regents of U. System of Ga.*, 304 U. S. 439; *Commodity Credit Corp.* v. *County of Okla.*, 36 F. Supp. 694 (W. D. Okla.); *Consolidation Coal Co.* v. *Martin*, 113 F. 2d 813 (CCA 6); *Gully* v. *Interstate Nat. Gas Co.*, supra; *Sancho* v. *Humacao Shipping Corp.*, 108 F. 2d 157 (CCA 1); *Thompson* v. *Louisiana*, 98 F. 2d 109 (CCA 8); *United States* v. *Query*, 37 F. Supp. 972 (E. D. S. Car.).

[7] See cases cited, footnotes 4, 5 and 6, supra.

[8] See cases cited in footnotes 4, 5 and 6, supra, and those collected in Borchard, *Declaratory Judgments*, supra, Chapter X, pp. 764, *et seq.*

[9] Cf. *Electric Bond & Share Co.* v. *Securities & Exchange Com'n*, 303 U. S. 419; *United States* v. *West Virginia*, 295 U. S. 463; *Ashwander* v. *T. V. A.*, supra.

[10] See Report of the House Committee on the Judiciary, 73d Congress, 2d Sess., Report No. 1264: "The declaratory judgment is a useful procedure in determining jural rights, obligations, and privileges, but may be applied to the ascertainment of almost any determinative fact or law. The declaration of a status was perhaps the earliest exercise of this procedure, such as the legality of marriage, the construction of written instruments, and the validity of statutes."

[11] See *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Ex parte Young*, 209 U. S. 123; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Sou. Pac. Co.* v. *Conicay*, supra.

[12] *Ibid.*, footnote 10.

This Court has held that the complaint stated a cause of action within the jurisdiction of the District Court under the Civil Rights Act without an allegation that the amount exceeded three thousand dollars exclusive of interests and costs. Inasmuch as this Court found that the District Court had jurisdiction to entertain the "bill" then it was the duty of this Court to render such a judgment as in its opinion the District Court should have rendered under the Declaratory Judgment Act. This Court having declared the ordinance in question unconstitutional, as did the District Court, the judgment of the Court affirming the judgment of the Circuit Court of Appeals, should be set aside and held for naught and the judgment of the District Court modified so as to allow the declaratory judgment to stand and, as modified, this Court should order the same affirmed. This seems to be the only fair, equitable and right thing to do in the circumstances that the case was fully developed before the District Court and *especially in view of the fact that this Court decided this case on a question which was neither briefed nor argued by counsel.*

TWO

This Court erred in affirming the judgment of the Circuit Court of Appeals and ordering the complaint dismissed because the pleadings and evidence showed extraordinary circumstances of great, immediate, irreparable injury and loss from respondents' actions under color of the ordinance so as to require granting of the injunction sought to redress deprivation of rights secured by the Federal Constitution pursuant to the Civil Rights Act.

This Court ran ahead of the parties in the litigation and decided a point that was not necessary for this Court

to determine. If this Court would have reversed the judgment of the Circuit Court of Appeals on the ground that the ordinance was unconstitutional, as it has been declared to be by this Court, then the parties would have had their litigation settled on the questions which they chose to present to the Court. The question of whether or not a cause of action in equity had been established would not have been disposed of by this Court in the case and the reversal of the judgment without a discussion of "want of equity", therefore, would not have disturbed the law on that subject.

Since the Court has "gone out of its way" to decide the question, it now becomes necessary for counsel to consider the correctness of the conclusion reached by this court on the issue of whether or not a cause of action was established in equity.

The *propriety* and necessity of the contributory and voluntary action taken by this Court in closing the doors of the federal courts to Jehovah's witnesses in this type of controversy, without being called upon to do so, are also discussed.

The situation with which this Court was confronted in this case is identical with the situation presented in the case of *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535-536, and the ruling of the Court in the instant case is directly contrary to the action taken in the case of *Pierce* v. *Society of Sisters*, supra. In that case the facts established did not present a case of clear, immediate and present danger of irreparable injuries, because the criminal statute had not become effective.

The Civil Rights Act [8 U. S. C. 43] provides, among other things, "Every person who, under color of any statute, ordinance . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 24 (14) [28 U. S. C. 41 (14)] among other things provides: "Of all suits at law or in equity authorized by law to be brought . . . to redress the deprivation, under color of any law, statute, ordinance . . . of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

It is manifest that the Civil Rights Act gives every person the right to resort to equity to redress the deprivation of "civil rights" by public officials under the guise of legislative enactment of a state or municipality. The purpose was to afford a remedy in the federal courts which should not be defeated by any technical rule of comity. The general rule prohibiting the federal courts from enjoining the wrongful enforcement and misapplication of state criminal statutes does not apply to that sort of action brought under the Civil Rights Act. The case of *Spielman Motor Co.* v. *Dodge*, 295 U. S. 95, and the authorities cited therein, together with scores of cases that have since been decided by the Court following that case does not apply here. Why? Because those cases involved only general constitutional rights secured by the *fourteenth amendment*, that is to say, property rights. Not one of the cases to be found in the reports where the Court has applied the rule announced in the *Dodge* case, supra, involved "civil rights". We submit that "civil rights" cases brought under the foregoing federal statutes cannot be defeated under the general rule announced in the *Dodge* case. Cf. *Hague* v. *C. I. O.*, 307 U. S. 496.

Beal v. *Missouri Pac. Ry. Co.*, 312 U. S. 45, does not apply here because the facts and circumstances in the case at bar show "exceptional and extraordinary circumstances

and great, irreparable and immediate injury" to petitioners if the injunction is not granted. Furthermore that case does not apply here because to invoke the rule would defeat the purposes of the Civil Rights Act. It is not applicable for the reasons that *Spielman Motor Co.* v. *Dodge*, supra, is not applicable.

To enforce the strict rule of construction against th Civil Rights Act so as to permit its provisions to be overridden by the rule announced in the above *Dodge* case would be to defeat the very purpose and intent of Congress in passing the Civil Rights Act which conferred jurisdiction upon the United States District Courts in this sort of case. While the act did not enlarge the jurisdiction of the court it certainly did provide and was intended to provide relief in federal courts to protect citizens deprived of civil rights in the circumstances shown in the case at bar.

It is therefore our position that it is not necessary to show "exceptional circumstances or reasons" in civil rights actions to the same extent as is required in injunctions brought to protect property rights secured by the Federal Constitution.

But assuming, for the purposes of argument, that the same degree of "exceptional circumstances or reasons" must be shown in civil-right cases as in property-right cases, the trial court properly granted the injunction because the facts and circumstances of the case clearly establish "extraordinary circumstances of danger of great and immediate irreparable injury and loss" so as to require the intervention of a federal court of equity to restrain the enforcement of the ordinance in question.

It is now well settled by decisions of the Court that where civil rights are being constantly denied by repetitious arrests, prosecutions and convictions under an ordinance which is either void on its face or, even though valid, is contrued and applied so as to deny persons their civil rights, federal courts will grant an injunction under the

Civil Rights Act of 1870 as amended in 1871 [28 U. S. C. 41 (14)], to redress the deprivation of said civil rights and to enjoin future interference therewith.

In recent years the first step in that direction was the case of *Hague* v. *C. I. O.*, 101 F. 2d 774-791, affirmed 307 U. S. 496.

In that *Hague* case this Court said:

> "The ordinance has been administered in an unconstitutional manner.
>
> "But even if we were to assume that the ordinance of Jersey City under consideration is valid and constitutional, none the less we find that it has been administered in a discriminatory and therefore unconstitutional manner. . . .
>
> "Such conduct on the part of the appellants is in violation of the due process clause of the Fourteenth Amendment. The criterion imposed by the authorities of Jersey City upon the right to speak therein is simply whether or not the individual who is to speak is a right thinking person in view of those who constitute the city authorities. No other test is applied. The authorities upon this subject are very clear. In Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 352, Mr. Justice McReynolds, delivering the opinion of the Supreme Court, stated: 'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.
>
> "We think that an American community, devoted to American principles, cannot exist upon the terms offered by the appellants. Minorities, however unpopular, must be allowed to make their voices heard and the whipping up of public indignation and public clamor to the end that free expression of opinion and free as-

> sembly may not be had sits with little grace upon the officials of an American city. Fundamental civil liberties must not be tampered with if our system of democratic government is to survive."

In this connection, let the Court bear in mind that what is sought here is not to restrain prosecutions now pending in the state courts. Petitioners admit that they are not entitled to enjoin pending prosecutions. (*Cline* v. *Frink Dairy Co.*, 274 U. S. 445) What petitioners ask is to restrain threatened future enforcement and repeated arrests and prosecutions under the ordinance in question. This relief is warranted under the cases above referred to. See, also, *Cline* v. *Frink Dairy Co.*, supra.

In *Nashville C. & St. L. Ry. Co.* v. *McConnell*, 82 F. 65, 70, the court said:

> "The very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot, in damages, compensate the injury or stop the wrong, furnishes the best possible reason for interference by court of equity."

See, also, *Dearborn Publishing Co.* v. *Fitzgerald*, 271 F. 479, where the court said:

> "Defendants' action, however, prevents other sales from time to time and from week to week. This is a continuing course of conduct, and, if not supported by a valid constitutional law or is in excess of authority conferred on them by any valid law or ordinance, becomes a continuing and repeated wrong. In this situation a court of equity has from time immemorial granted relief."

In recent months other federal courts have granted injunctions restraining enforcement of ordinances very similar to this one, as applied to Jehovah's witnesses, to which

we refer here without argument, because to do so would be 'gilding the lily', as such opinions contain complete argument in favor of the right of Jehovah's witnesses to an injunction in this case.[13]

Many other federal courts have granted injunctions in favor of Jehovah's witnesses restraining ordinances similar to this, but in which cases no opinions were written,[14] and the cases recently terminated by granting of permanent injunction in favor of Jehovah's witnesses restraining enforcement of like ordinances of three other municipalities, to wit, Beaufort, S. C., Ardmore, Okla., and Green Forest, Ark.

The case of *Reid* v. *Borough of Brookville et al.*, 39 F. Supp. 30, is in point here. In that case the United States District Judge in granting the injunction in favor of Jehovah's witnesses restraining the enforcement of an ordinance said: "It may be noted, however, that the instant cases differ from those cited [Lovell v. City of Griffin, 303 U. S. 444; Schneider v. Irvington, 308 U. S. 147; Cantwell v. Connecticut, 310 U. S. 296] in that the latter were appeals from State courts, while the plaintiffs herein are seeking injunctions against threatened future enforcement of the ordinances against Jehovah's witnesses, but not upon any prior convictions against them. This difference in situation is of no moment, owing to the continuing nature of the acts of the defendants. Ordinarily a court of equity will not

[13] *Barnette* v. *West Virginia State Board*, 47 F. Supp. 251; *Oney* v. *City of Oklahoma City*, 120 F. 2d 861; *Lynch* v. *Muskogee* [Okla.] 47 F. Supp. 589; *Kennedy* v. *City of Moscow* [Idaho], 39 F. Supp. 26; *Zimmermann* v. *Village of London* [Ohio], 38 F. Supp. 582; *Beeler* v. *Smith* [Harlan, Ky.] et al., 40 F. Supp. 139; *Reid* v. *Brookville* [Pa.], 39 F. Supp. 30; *Donley* v. *City of Colorado Springs*, 40 F. Supp. 15; *Borchert* v. *Rahger* [Texas] et al., 42 F. Supp. 577.

[14] *Widle* v. *City of Harrison*, Arkansas Federal District Court, Western Dist., granted January 9, 1941; *Roe* v. *City of North Little Rock*, Arkansas Federal Dist. Ct., Eastern Dist., granted January 27, 1941; *Mickey* v. *City of Excelsior Springs*, Missouri Federal Dist. Ct., Western Dist., granted January 9, 1941; *Roberts* v. *City of Hot Springs*, Arkansas Federal Dist. Ct., Western Dist., granted May 8, 1941; *Dallos* v. *City of Atlantic City*, New Jersey Federal Dist. Ct., granted October 11, 1940.

intervene to enjoin procedure under criminal statutes, but will do so to prevent continuing invasion of property or constitutional rights. Terrace v. Thompson; 263 U. S. 197; Hague v. C. I. O., et al., 307 U. S. 496. Appeals from the Court of the Burgess of the borough, through the courts of the State to the Supreme Court of the United States would not furnish prompt and complete relief under the circumstances of the instant case."

The continuing activity of Jehovah's witnesses in the distribution of literature, with each act of which distribution money contribution is received, constituted (according to respondents) a separate alleged violation of the ordinance; therefore the act of respondents in continuing to arrest petitioners is a continuing act in violation of petitioners constitutional rights, constantly going on, and which cannot be compensated in money damages. The Court has held that *civil rights* are incapable of money valuation. *Hague* v. *C. I. O.*; 307 U. S. 496.

The courts have universally held that an injunction is properly granted in order to preserve the property rights of the plaintiff.

There are many other instances in which injunctions have been granted to restrain enforcement of ordinances and statutes interfering with civil rights and property rights of citizens contrary to the United States Constitution.[15]

[15] *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Ex parte Young*, supra; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535-536; *Swift & Co.* v. *United States*, 276 U. S. 311; *Vicksburg Waterworks* v. *Vicksburg*, 185 U. S. 65, 82; *Greene* v. *Louisville & J. R. Co.*, 244 U. S. 499, 506-508, 520-521; *Sterling* v. *Constantin*, 287 U. S. 378, 393, 403-404; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434; *Work* v. *Louisiana*, 269 U. S. 250, 254; *Colorado* v. *Toll*, 268 U. S. 228, 230; *Cline* v. *Frink Dairy Co.*, supra; *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317; *Adams* v. *Tanner*, 244 U. S. 590; *Kennington* v. *Palmer*, 255 U. S. 100; *Truax* v. *Raich*, 239 U. S. 33, 219 F. 273; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Terrace* v. *Thompson*, 263 U. S. 197; *Ludwig* v. *Western Union*, 216 U. S. 146; *Western Union Tel. Co.* v. *Andrews*, 216 U. S. 165; *Ex parte Bransford*, 310 U. S. 354, 361.

For protection of the rights of petitioners and other of Jehovah's witnesses it is necessary that respondents be enjoined from instituting actions under the ordinance which the trial court held to be unconstitutional as applied to petitioners and other of Jehovah's witnesses, because immediate and irreparable injury is shown.

Nashville, C. & St. L. Ry. Co. v. McConnell, supra
Dearborn Pub. Co. v. Fitzgerald, 271 F. 479
Johnson v. Wells Fargo, 239 U. S. 234

Respondents have actually committed the overt criminal act of foully arresting and wrongfully prosecuting Jehovah's servants, ordained ministers of Almighty God, and depriving them, wrongfully, of their civil rights. Where, as here, is shown the overt act of repeated prosecution under a particular legislative enactment, such constitutes "circumstantial evidence" which proves immediate and imminent injury and damage.

The undisputed evidence and express admissions from the witness stand on the part of respondents show express and undeniable threats to continue to prosecute under the particular ordinance any of Jehovah's witnesses found distributing literature and simultaneously receiving money contributions.

Here the lives, reputation, property, family, liberty and civil rights of petitioners are at stake and at the mercy of respondents. They are deprived of their rights of freedom of speech, press and worship, arrested, prosecuted, convicted, forced again and again to appeal such convictions, entailing huge burdens of labor and expense to defend their lawful exercise of constitutionally secured rights. It is impossible to compensate these things with money. Petitioners and other of their society's representatives are denied their

liberty by continuous incarceration which cannot be compensated by money. Their reputation as upright, God-fearing and order-loving residents of the state is "blackened" by the prosecutions. All the wealth and property in the world does its owner no good whatever if he is wrongfully deprived of his liberty and incarcerated behind four walls. His liberty, and especially his civil liberty, is more highly cherished and desired than his property.

Facts in the case at bar are in sharp contrast to those of the cases relied upon by respondents. Petitioners here are lawfully engaged in a continuous course of conduct which respondents allege to be continuous violation committed under the ordinances.

Federal courts have the power to restrain enforcement of a valid statute which is being enforced in an unconstitutional manner.[16]

Due process of law is not confined to invasion of rights through denial of procedural steps in state courts. The fact that courts are open in the state with fair procedure to protect rights does not prevent local officials from threatening to act and acting so as to deny one his inherent civil rights. Wrongful use of statute so as to infringe such constitutional rights is sufficient showing under "due process". The procedural steps are often followed completely and explicitly in the state courts and yet on the merits through conviction one is denied his constitutional rights.

This question urged by this Court has been squarely answered by the Court itself in cases dealing with the *jurisdiction* of the statutory *three-judge court* involving state statutes. In *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 506-508, it is said:

[16] *Borchert* v. *Ranger*, supra; *Lynch* v. *Muskogee*, supra; *Barnette* v. *West Virginia State Board of Educ'n*, supra; *Oney* v. *City of Oklahoma City*, supra; *Sterling* v. *Constantin*, supra; *Greene* v. *L. & I. Ry. Co.*, supra; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, 545; *Colorado* v. *Toll*, supra.

"The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 390, was a case not of an unconstitutional statute, but of confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. The court, by Mr. Justice Brewer, said:

> "'Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual.'"

See also *Sterling* v. *Constantin*, 287 U. S. 378, 393, where the court said:

"Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the state, deprive the three-judge court of jurisdiction. Iowa Des Moines Bank v. Bennett, 284 U. S. 239, 246; Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 434.

"As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the governor, was challenged, the application for injunction was properly heard by three judges. Stratton v. St. Louis Southwestern Ry. Co.,

282 U. S. 10. The jurisdiction of the District Court so constituted and of this court upon appeal extends to every question involved whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. Siler v. Louisville & Nashville Ry. Co., 213 U. S. 175, 191, 298, 303; Davis v. Wallace, 257 U. S. 478, 482; Waggoner Estate v. Wichita County, 273 U. S. 113, 116."

See *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434, stating:

"It is suggested that the District Court had no jurisdiction because the bill does not allege that the statute is unconstitutional, but only that the statute as construed and applied by the defendants is so. But even if the statute did not plainly purport to justify and require the threatened action, or if the bill fairly taken did not import a denial of the constitutionality of the law as applied to this case, the plaintiff still would be entitled to come into a court of the United States to prevent such an alleged violation of its constitutional rights."

In this same connection see *Lee* v. *Bickell*, 292 U. S. 415.

Please note that paragraph 14 of Section 24 of the Judicial Code *does not* say "redress the deprivation under" *statutes unconstitutional on their face or unconstitutional as construed;* but it allows jurisdiction where the alleged deprivation is "under color of any law, statute, *ordinance*, regulation, custom, or usage, of any State, *of any right*, privilege, or immunity, secured by the Constitution".

Federal courts have repeatedly held that the right to urge a defense in the prosecution of a criminal action brought in the state courts, in which the unconstitutionality

of an ordinance can there be urged, does not constitute an adequate remedy at law sufficient to warrant denial of an injunction where there is shown clear and present danger of irreparable injury from threatened future enforcement.

The Circuit Court of Appeals, in *Hague* v. *C. I. O.*, supra, said:

> "The appellants contend that the appellees have a full and adequate remedy at law and that therefore the causes of action set up in the bill of complaint are not cognizable in equity. In our opinion this contention cannot be sustained. The record shows a shocking and constant disregard of the basic civil rights of the appellees by the appellants. These acts were torts and their threatened continuance is sufficient ground for the equitable relief sought and granted. Terrace v. Thompson, 263 U. S. 197; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 11, 12; Osborn & Co. v. Missouri Pac. Ry. Co., 147 U. S. 248, 258."

In *Terrace* v. *Thompson*, 263 U. S. 197, the court said:

> "They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had if the law complained of is shown to be in contravention of the Federal Constitution."

Here such showing was made to the satisfaction of the trial court, which rightly granted the relief asked.

In *Petroleum Exploration, Inc.* v. *Public Service Comm. of Ky.*, 304 U. S. 209, the court said:

> "The injury which flows from the threat of enforcement of an allegedly unconstitutional, regulatory state statute with penalties so heavy as to forbid the risk of

challenge in proceedings to enforce it is generally recognized as irreparable and sufficient to justify an injunction."

In *Railroad and Warehouse Comm. of Minnesota et al.* v. *Duluth St. Ry. Co.*, 273 U. S. 625, 628, the court said:

> "Where as here *a constitutional right* is insisted on we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the State court when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the District Court of the United States. Pac. Tel. & Teleg. Co. v. Kuykendall, 265 U. S. 196. Okla. Natural Gas Co. v. Russell, 261 U. S. 290."[17]

In *Smyth* v. *Ames*, 169 U. S. 466, at pp. 516, 517, the Court said as follows:

> "So whenever a citizen of a State can go into the Courts of a State to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts; Regan v. Farmers Loan and Trust Co., 154 U. S. 362, 391; Mississippi Mills v. Cohn, 150 U. S. 202, 204; Cowles v. Mercer Co., 7 Wall, 118; Lincoln County v. Luning, 133 U. S. 529; Scott v. Neely, 140 U. S. 106; Chicot County v. Sherwood, 148 U. S. 529; Gates v. Allen, 149 U. S. 451."

[17] See also: *Stratton* v. *St. L. & S. W. Ry. Co.*, 284 U. S. 530, 534; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 388; *Terrace* v. *Thompson*, supra; *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 214-216; *Petroleum Exploration* v. *Public Service Comm.*, supra.

In *New Hampshire Gas & Electric Co.* v. *Morse*, 42 F. 2d 90-93, District Judge Morris, speaking for the statutory three-judge court, held that the right of appeal from an order of the public service commission, committing the plaintiff's agents for contempt was not an adequate remedy at law because such remedy was not enforceable in the federal court, and concluded by granting injunction in favor of the plaintiffs, restraining the unconstitutional action of the state officials, and quoted further from *Smyth* v. *Ames*, supra, as follows:

> "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

On this same question Judge Morris in the above case for the statutory three-judge court said as follows:

> "When the jurisdiction of a federal court of equity attaches, it is governed by its own rules of procedure and not by those prevailing in the state jurisdiction.
>
> . . .
>
> "It is not reasonable to hold that a person must violate a law and subject himself to possible fines of imprisonment in order to contest the constitutionality of a statute authorizing the imposition of a penalty. Threats of the constituted authorities are sufficient to set in motion an action to contest such rights. Western

Union Telegraph Co. v. Andrews, 216 U. S. 165, 30 S. Ct. 286, 54 L. Ed. 430."

In *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203 at pages 214, 216, the same principle was announced and the following additional statement made:

> "It must be a remedy which may be resorted to without impediment created otherwise than by the act of the party. . . . The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. Bank of Kentucky v. Stone, 88 F. 383; Lincoln Nat. Life Ins. Co. v. Hammer, 41 F. (2) 12, 16."

To the same effect is *Atlas Ins. Co.* v. *Southern, Inc.*, 306 U. S. 563, 569, which cites the following cases: *Risty* v. *Chicago R. I. & P. Ry. Co.*, 270 U. S. 378, 388; *De Giovanni* v. *Camden Fire Ins. Assn.*, 296 U. S. 64, 69; *Petroleum Exploration Inc.* v. *Public Service Comm.*, supra.

It is manifest that the remedy in an appeal to the state courts is not equally as clear and adequate and sufficient as the remedy provided through injunction. The very fact that Jehovah's witnesses have spent large sums in cash and have incurred and suffered damages by reason of the unlawful proceedings prosecuted by respondents, is proof positive that an adequate remedy at law does not exist.

Furthermore, the Civil Rights Act does not require showing of lack of adequate remedy at law as a condition precedent.

Additionally, the adequate remedy at law contemplated is an adequate remedy at law in Federal courts and not State courts; and it is admitted that no adequate remedy at law in the Federal courts exists.

It is noticed that this Court says: "In any event, an injunction looks to the future", as though this were ground for denying an injunction. Of course, everyone knows that

an injunction looks to the future, but it is certainly not grounds for denying an injunction, for this Court held in the case of *Cline* v. *Frink Dairy*, supra, that a federal court could enjoin, "future prosecutions". The judgment of the District Court in the *Cline* case was modified, striking out that part of the judgment which enjoined prosecution of pending indictments in the state district court at Denver. Insofar as a question of clear and present danger of irreparable injury is concerned, the facts in the *Cline* v. *Frink Dairy* case, supra, are identical with the facts in the case at bar.

The point that has been entirely overlooked by the Court in this case is that great injury will be inflicted on the lawful, constitutionally-safeguarded practice or "business" of petitioners, which is preaching the Gospel of God's Kingdom, and which practice stands on the same high level with the dairy business involved in the *Cline* case, supra, and the operation of the parochial schools in the case of *Pierce* v. *Society of Sisters*, supra.

In conclusion this Court seizes upon the proposition for ground to deny the injunction:

> "And in view of the decision rendered *today* . . . we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate." [Italics added]

This certainly is an irrelevant and immaterial statement and grafts a new theory onto civil procedure in federal courts, to wit, that an appellate court can view the facts differently from the trial after the case has been decided by the appellate court, in determining whether or not an injunction should have been granted by the trial court. There is only one view that this Court can take toward the facts in this case and that is this, to wit,

What were the circumstances that existed on and prior to February 21, 1941, and May 13, 1941?

and NOT,

What are the facts and circumstances as they exist on May 3, 1943?—two years after the evidence was developed in the District Court.

This Court has uniformly held to the policy of looking at the record as it existed before the court below at the time the relief was awarded.

This Court says as grounds for holding that "want of equity" was found to exist in the case: "But the court made no finding of threatened irreparable injury to petitioners or others". It was not necessary for the Court to make this finding. It would have been appropriate to do so in the circumstances, because the record and evidence shows that there was near and present danger of irreparable injury. The record and evidence establishes the fact of great and irreparable injury to the "business" of petitioners, to wit, preaching the Gospel of God's Kingdom, and it must be presumed by this Court that sufficient findings were made to support the judgment of the court below. The failure of the trial court to make a formal finding to this effect is not ground to deny the rights of Jehovah's witnesses and especially is no justification for this Court to "go out of its way" to *reverse* the judgment of the District Court in this case.

It has uniformly been the rule—established by this Court for many years—that if nothing to the contrary appears in the record, every reasonable intendment may be and ought to be made in favor of the validity and correctness of the judgment under review.[18] The line of cases holding that the district court is presumed not to have

[18] *Morgan v. Daniels*, 153 U. S. 120; *Rogers v. United States*, 141 U. S. 548.

jurisdiction unless the contrary appears,[19] rest on the fact that the federal district courts are not courts of "general" jurisdiction, but are courts of "limited" jurisdiction. However, this rule does not apply to whether or not a cause of action in equity is established. The presumption is that the trial court did not abuse its discretion and that the trial court found sufficient and adequate facts and good cause for the rendering of the judgment.

It is respectfully submitted that it is not proper in the circumstances disclosed in this case for this Court to substitute its discretion for that of the trial court.

In the case of *Pierce* v. *Society of Sisters*, supra, the evidence of "clear and immediate irreparable" injury was not nearly as strong as the evidence here. This Court could have easily declined to sustain the injunction on the same ground in that case as was done here *without prior invitation*. The *Society of Sisters* case is authority here and conclusively sustains the position taken on this motion by petitioners.

Before this motion is concluded it is suggested that it would be more in keeping with this Court's policy of liberality and fairness to counsel and litigants to have suggested to counsel in advance of oral argument that the Court wanted to hear argument on the issue of "want of equity". This was done in the case of *Japinson* v. *Texas*, 318 U. S. . . . , (63 S. Ct. 669), on the jurisdictional question; and in the case of *Great Lakes Dredge & Dock Co.* v. *Chavlet* (No. 849, October Term 1942), now under consideration by this Court, on the question of whether or not the declaratory-judgment procedure was available to the petitioners in that case. If this Court holds that the declaratory-judgment procedure was available to petitioners in that proceeding, then, *a forfiori*, the First Ground of this motion should be sustained and the judgment of May 3, 1943, in this cause set aside and held for naught.

[19] *Citizens Bank* v. *Cannon*, 164 U. S. 319.

CONCLUSION

Wherefore, petitioners pray that the order and judgment heretofore entered affirming the judgment of the Circuit Court of Appeals below be set aside and held for naught, and that on the briefs of the parties and the supporting argument herein this motion for rehearing be granted and the Court here render an order reversing the judgment of the Circuit Court of Appeals and affirming the judgment of the trial court; or, in the alternative, modify the judgment of the district court and, as modified, affirm the same.

If this relief cannot be granted on the motion for rehearing without oral argument, then petitioners pray that the Court order this cause to be reargued orally.

Petitioners pray for such other relief as they may show themselves justly entitled to in the premises.

ROBERT L. DOUGLAS
ALBERT R. GUNDECKER
EARL KALKBRENNER
CARROL CHRISTOPHER
VICTOR SWANSON
NICHOLAS KODA
CHARLES SEDERS
ROBERT LAMBORN
ROBERT MURDOCK, JR.

By HAYDEN C. COVINGTON
Attorney for Petitioners

CERTIFICATE

I, Hayden C. Covington, do hereby certify that the foregoing motion for rehearing is prepared and filed in good faith so that justice may be done and not for the purpose of delay.

HAYDEN C. COVINGTON
Attorney for Petitioners

SUPREME COURT OF THE UNITED STATES.

No. 450.—October Term, 1942.

Robert L. Douglas, Albert R. Gundecker, Earl Kalkbrenner, et al., Petitioners, vs. City of Jeanette (Pennsylvania), a Municipal Corporation, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 3, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioners brought this suit in the United States District Court for Western Pennsylvania to restrain threatened criminal prosecution of them in the state courts by respondents, the City of Jeanette (a Pennsylvania municipal corporation) and its Mayor, for violation of a city ordinance which prohibits the solicitation of orders for merchandise without first procuring a license from the city authorities and paying a license tax. The ordinance as applied is held to be an unconstitutional abridgement of free speech, press and religion in Nos. 480-487, *Murdock et al. v. Pennsylvania*, decided this day. The questions decisive of the present case are whether the district court has statutory jurisdiction as a federal court to entertain the suit, and whether petitioners have by their pleadings and proof established a cause of action in equity.

The case is not one of diversity of citizenship, since some of the petitioners, like respondents, are citizens of Pennsylvania. The bill of complaint alleges that the named plaintiffs are Jehovah's Witnesses, persons who entertain religious beliefs and engage in religious practices which it describes; that the suit is a class suit brought in petitioners' own behalf and in behalf of all other Jehovah's Witnesses in Pennsylvania and adjoining states to restrain respondents from enforcing ordinance No. 60 of the City of Jeanette against petitioners and all other Jehovah's Witnesses because, as applied to them, the ordinance abridges the guaranties of freedom of speech, press, and religion of the First Amendment made applicable to the states by the Fourteenth.

The suit is alleged to arise under the Constitution and laws of the United States, including the Civil Rights Act of 1871. The complaint sets up that in the practice of their religion and in conformity to the teachings of the Bible, Jehovah's Witnesses make and for many years have made house to house distribution among the people of the City of Jeanette, of certain printed books and pamphlets setting forth the Jehovah's Witnesses' interpretations of the teachings of the Bible. Municipal Ordinance No. 60 provides: "That all persons canvassing or soliciting within said Borough (now City of Jeannette) orders for goods, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited," without first procuring a license and paying prescribed license taxes, shall be punished by fine not exceeding $100 and costs, or if the fine is not paid, by imprisonment from five to thirty days. It is alleged that in April, 1939, respondents arrested and prosecuted petitioners and other Jehovah's Witnesses for violation of the ordinance because of their described activities in distributing religious literature, without the permits required by the ordinance, and that respondents threaten to continue to enforce the ordinance by arrests and prosecutions—all in violation of petitioners' civil rights.

No preliminary or interlocutory injunction was granted but the district court, after a trial, held the ordinance invalid, 39 F. Supp. 32, on the authority of *Reid* v. *Borough of Brookville*, 39 F. Supp. 30, in that it deprived petitioners of the rights of freedom of press and religion guaranteed by the First and Fourteenth Amendments. The court enjoined respondents from enforcing the ordinance against petitioners and other Jehovah's Witnesses.

The Court of Appeals for the Third Circuit sustained the jurisdiction of the district court, but reversed on the merits. 130 F. 2d 652, on the authority of *Jones* v. *Opelika*, 316 U. S. 584. One judge dissented on the ground that the complaint did not sufficiently allege a violation of the Due Process Clause of the Fourteenth Amendment so as to entitle petitioners to relief under the Civil Rights Act. We granted certiorari, 318 U. S. —, and set the case for argument with Nos. 480-487, *Murdock et al.* v. *Pennsylvania*, *supra*.

We think it plain that the district court had jurisdiction as a federal court to hear and decide the question of the constitutional

validity of the ordinance, although there was no allegation or proof that the matter in controversy exceeded $3,000. By 8 U. S. C. §43 (derived from §1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, continued without substantial change as R. S. § 1979) it is provided that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

As we held in *Hague* v. *C. I. O.*, 307 U. S. 496, 507-14, 527-32, the district courts of the United States are given jurisdiction by 28 U. S. C. § 41 (14) over suits brought under the Civil Rights Act without the allegation or proof of any jurisdictional amount. Not only do petitioners allege that the present suit was brought under the Civil Rights Act, but their allegations plainly set out an infringement of its provisions. In substance, the complaint alleges that respondents, proceeding under the challenged ordinance, by arrest, detention and by criminal prosecutions of petitioners and other Jehovah's Witnesses, had subjected them to deprivation of their rights of freedom of speech, press and religion secured by the Constitution, and the complaint seeks equitable relief from such deprivation in the future.

The particular provision of the Constitution on which petitioners rely is the Due Process Clause of the Fourteenth Amendment, violation of which the dissenting judge below thought was not sufficiently alleged to establish a basis for relief under the Civil Rights Act. But we think this overlooks the special relationship of the Fourteenth Amendment to the rights of freedom of speech, press, and religion guaranteed by the First. We have repeatedly held that the Fourteenth Amendment has made applicable to the states the guaranties of the First. *Schneider* v. *State*, 308 U. S. 147, 160, n. 8 and cases cited; *Jamison* v. *Texas*, 318 U. S. —. Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgment of the right is effected under color of a state statute or ordinance. It follows that the bill, which amply alleges the facts relied on to show the abridgment

by criminal proceedings under the ordinance; sets out a case or controversy which is within the adjudicatory power of the district court.

Notwithstanding the authority of the district court, as a federal court, to hear and dispose of the case, petitioners are entitled to the relief prayed only if they establish a cause of action in equity. Want of equity jurisdiction, while not going to the power of the court to decide the cause, *Di Giovanni* v. *Camden Ins. Assn.*, 296 U. S. 64, 69; *Pennsylvania* v. *Williams*, 294 U. S. 176, 181-82, may nevertheless, in the discretion of the court, be objected to on its own motion. *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, 690; *Pennsylvania* v. *Williams*, *supra*, 185. Especially should it do so where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court.

The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court, of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. *Di Giovanni* v. *Camden Ins. Assn.*, *supra*, 73; *Matthews* v. *Rodgers*, 284 U. S. 521, 525-26; cf. *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13; *Massachusetts State Grange* v. *Benton*, 272 U. S. 525.

It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. *Davis & Farnum Mfg. Co.* v. *Los Angeles*,

189 U. S. 207; *Fenner* v. *Boykin*, 271 U. S. 240. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury "both great and immediate." *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95, and cases cited; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49, and cases cited; *Watson* v. *Buck*, 313 U. S. 387; *Williams* v. *Miller*, 317 U. S. 599.

The trial court found that respondents had prosecuted certain of petitioners and other Jehovah's Witnesses for distributing the literature described in the complaint without having obtained the license required by the ordinance, and had declared their intention further to enforce the ordinance against petitioners and other Jehovah's Witnesses. But the court made no finding of threatened irreparable injury to petitioners or others, and we cannot say that the declared intention to institute other prosecutions is sufficient to establish irreparable injury in the circumstances of this case.

Before the present suit was begun, convictions had been obtained in the state courts in cases Nos. 480-487, *Murdock et al.* v. *Pennsylvania*, *supra*, which were then pending on appeal and which were brought to this Court for review by certiorari contemporaneously with the present case. It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court. In these respects the case differs from *Hague* v. *C. I. O.*, *supra*, 501-02, where local officials forcibly broke up meetings of the complainants and in many instances forcibly deported them from the state without trial.

There is no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision of this Court holding the challenged ordinance unconstitutional

as applied to petitioners. If the ordinance had been held constitutional, petitioners could not complain of penalties which would have been but the consequence of their violation of a valid state law.

Nor is it enough to justify the exercise of the equity jurisdiction in the circumstances of this case that there are numerous members of a class threatened with prosecution for violation of the ordinance. In general the jurisdiction of equity to avoid multiplicity of civil suits at law is restricted to those cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact. It does not ordinarily extend to cases where there are numerous parties and the issues between them and the adverse party—here the state—are not necessarily identical. *Matthews* v. *Rodgers*, *supra*, 529-30, and cases cited. Far less should a federal court of equity attempt to envisage in advance all the diverse issues which could engage the attention of state courts in prosecutions of Jehovah's Witnesses for violations of the present ordinance, or assume to draw to a federal court the determination of those issues in advance, by a decree saying in what circumstances and conditions the application of the city ordinance will be deemed to abridge freedom of speech and religion.

In any event, an injunction looks to the future. *Texas Co.* v. *Brown*, 258 U. S. 466, 474; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 182. And in view of the decision rendered today in Nos. 480-487, *Murdock et al.* v. *Pennsylvania*, *supra*, we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate.

For these reasons, establishing the want of equity in the cause, we affirm the judgment of the circuit court of appeals directing that the bill be dismissed.

Affirmed.

op. 2, #, 8 - 10

SUPREME COURT OF THE UNITED STATES.

Nos. 450, 480-487, 238.—October Term, 1942.

450	Robert L. Douglas, Albert R. Gundecker, Earl Kalkbrenner, et al., Petitioners, *vs.* City of Jeannette (Pennsylvania), a municipal corporation, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
480	Robert Murdock, Jr., Petitioner, *vs.* Commonwealth of Pennsylvania (City of Jeannette).	On Writs of Certiorari to the Superior Court of the Commonwealth of Pennsylvania.
481	Anna Perisich, Petitioner, *vs.* Commonwealth of Pennsylvania (City of Jeannette).	
482	Willard L. Mowder, Petitioner, *vs.* Commonwealth of Pennsylvania (City of Jeannette).	
483	Charles Seders, Petitioner, *vs.* Commonwealth of Pennsylvania (City of Jeannette).	
484	Robert Lamborn, Petitioner, *vs.* Commonwealth of Pennsylvania (City of Jeannette).	
485	Anthony Maltezos, Petitioner, *vs.* Commonwealth of Pennsylvania (City of Jeannette).	
486	Anastasia Tzanes, Petitioner, *vs.* Commonwealth of Pennsylvania (City of Jeannette).	
487	Ellaine Tzanes, Petitioner, *vs.* Commonwealth of Pennsylvania (City of Jeannette).	
238	Thelma Martin, Appellant, *vs.* City of Struthers, Ohio.	On Appeal from the Supreme Court of the State of Ohio.

[May 3, 1943.]

Mr. Justice Jackson.

Except the case of *Douglas et al.* v. *Pennsylvania*, all of these cases are decided upon the record of isolated prosecutions in which information is confined to a particular act of offense and to the behavior of an individual offender. Only the *Douglas* record gives a comprehensive story of the broad plan of campaign employed

by Jehovah's Witnesses and its full impact on a living community. But the facts of this case are passed over as irrelevant to the theory on which the Court would decide its particular issue. Unless we are to reach judgments as did Plato's men who were chained in a cave so that they saw nothing but shadows we should consider the facts of the *Douglas* case at least as an hypothesis to test the validity of the conclusions in the other cases. This record shows us something of the strings as well as the marionettes. It reveals the problem of those in local authority when the right to proselyte comes in contact with what many people have an idea is their right to be let alone. The Chief Justice says for the Court in *Douglas* that "in view of the decision rendered today in Nos. 480-487, *Murdock et al.* v. *Pennsylvania*, *supra*, we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate," which could hardly be said if the constitutional issues presented by the facts of this case are not settled by the *Murdock* case. The facts of record in the *Douglas* case and their relation to the facts of the other cases seem to me worth recital and consideration if we are realistically to weigh the conflicting claims of rights in the related cases today decided.

From the record in *Douglas* ~~v. *City of Jeannette*~~ we learn:

In 1939, a "Watch Tower Campaign" was instituted by Jehovah's Witnesses in Jeannette, Pennsylvania, an industrial city of some 16,000 inhabitants.[1] Each home was visited, a bell was rung or the door knocked upon, and the householder advised that the Witness had important information. If the householder would listen, a record was played on the phonograph. Its subject was "Snare and Racket." The following words are representative of its contents: "Religion is wrong and a snare because it deceives the people, but that does not mean that all who follow religion are willingly bad. Religion is a racket because it has long been used and is still used to extract money from the people

[1] Sixteenth Annual Census of the United States (1940), Population, Volume I (Census Bureau of the United States Department of Commerce) p. 922. The City of Jeannette is included in Westmoreland County, shown by the 1940 Census to have a population of 303,411, an increase over 1930 and 1920: *Ibid.* The 1936 Census of Religious Bodies shows that of the people in Westmoreland County 168,608 were affiliated with some religious body; 80,276 of them with the Roman Catholic Church. Census of Religious Bodies (1936), Volume I (Census Bureau of the United States Department of Commerce) pp. 809-814. According to unpublished information in the files of the Census Bureau, the 1936 Census of Religious Bodies shows that there were in the City of Jeannette 5,520 Roman Catholics. Thus it appears that the percentage of Catholics in the City is somewhat higher than in the County as a whole.

upon the theory and promise that the paying over of money to a priest will serve to relieve the party paying from punishment after death and further insure his salvation." This line of attack is taken by the Witnesses generally upon all denominations, especially the Roman Catholic. The householder was asked to buy a variety of literature for a price or contribution. The price would be twenty-five cents for the books and smaller sums for the pamphlets. Oftentimes, if he was unwilling to purchase, the book or pamphlet was given to him anyway.

When this campaign began, many complaints from offended householders were received, and three or four of the Witnesses were arrested. Thereafter, the "zone servant" in charge of the campaign conferred with the Mayor. He told the Mayor it was their right to carry on the campaign and showed him a decision of the United States Supreme Court, said to have that effect, as proof of it. The Mayor told him that they were at liberty to distribute their literature in the streets of the city and that he would have no objection if they distributed the literature free of charge at the houses, but that the people objected to their attempt to force these sales, and particularly on Sunday. The Mayor asked whether it would not be possible to come on some other day and to distribute the literature without selling it. The zone servant replied that that was contrary to their method of "doing business" and refused. He also told the Mayor that he would bring enough Witnesses into the City of Jeannette to get the job done whether the Mayor liked it or not. The Mayor urged them to await the outcome of an appeal which was then pending in the other cases and let the matter take its course through the courts. This, too, was refused, and the threat to bring more people than the Mayor's police force could cope with was repeated.

On Palm Sunday of 1939, the threat was made good. Over 100 of the Witnesses appeared. They were strangers to the city and arrived in upwards of twenty-five automobiles. The automobiles were parked outside the city limits, and headquarters were set up in a gasoline station with telephone facilities through which the director of the campaign could be notified when trouble occurred. He furnished bonds for the Witnesses as they were arrested. As they began their work, around 9:00 o'clock in the morning, telephone calls began to come in to the Police Headquarters, and complaints in large volume were made all during the day. They

exceeded the number that the police could handle, and the Fire Department was called out to assist. The Witnesses called at homes singly and in groups, and some of the homes complained that they were called upon several times. Twenty-one Witnesses were arrested. Only those were arrested where definite proof was obtainable that the literature had been offered for sale or a sale had been made for a price. Three were later discharged for inadequacies in this proof, and eighteen were convicted. The zone servant furnished appeal bonds.

The national structure of the Jehovah's Witness movement is also somewhat revealed in this testimony. At the head of the movement in this country is the Watch Tower Bible & Tract Society, a corporation organized under the laws of Pennsylvania, but having its principal place of business in Brooklyn, N. Y. It prints all pamphlets, manufactures all books, supplies all phonographs and records, and provides other materials for the Witnesses. It "ordains" these Witnesses by furnishing each, on a basis which does not clearly appear, a certificate that he is a minister of the Gospel. Its output is large and its revenues must be considerable. Little is revealed of its affairs. One of its "zone servants" testified that its correspondence is signed only with the name of the corporation and anonymity as to its personnel is its policy. The assumption that it is a "non-profit charitable" corporation may be true, but it is without support beyond mere assertion. In none of these cases has the assertion been supported by such usual evidence as a balance sheet or an income statement. What its manufacturing costs and revenues are, what salaries or bonuses it pays, what contracts it has for supplies or services we simply do not know. The effort of counsel for Jeannette to obtain information, books and records of the local "companies" of Witnesses engaged in the Jeannette campaign in the trial was met by contradictory statements as to the methods and meaning of such meager accounts as were produced.

The publishing output of the Watch Tower corporation is disposed of through converts, some of whom are full-time and some part-time ministers. These are organized into groups or companies under the direction of "zone servants." It is their purpose to carry on in a thorough manner so that every home in the communities in which they work may be regularly visited three or four times a year. The full-time Witnesses acquire their literature from the Watch Tower Bible & Tract Society at a figure

which enables them to distribute it at the prices printed thereon with a substantial differential. Some of the books they acquire for 5¢ and dispose of for a contribution of 25¢. On others, the margin is less. Part time ministers have a differential between the 20¢ which they remit to the Watch Tower Society and the 25¢ which is the contribution they ask for the books. We are told that many of the Witnesses give away a substantial quantity of the literature to people who make no contributions. Apart from the fact that this differential exists and that it enables the distributors to meet in whole or in part their living expenses, it has proven impossible in these cases to learn the exact results of the campaigns from a financial point of view. There is evidence that the group accumulated a substantial amount from the differentials, but the tracing of the money was not possible because of the failure to obtain records and the failure, apparently, to keep them.

The literature thus distributed is voluminous and repetitious. Characterization is risky, but a few quotations will indicate something of its temper.

Taking as representative the book "Enemies," of which J. F. Rutherford, the lawyer who long headed this group, is the author, we find the following: "The greatest racket ever invented and practiced is that of religion. The most cruel and seductive public enemy is that which employs religion to carry on the racket, and by which means the people are deceived and the name of Almighty God is reproached. There are numerous systems of religion, but the most subtle, fraudulent and injurious to humankind is that which is generally labeled the 'Christian religion,' because it has the appearance of a worshipful devotion to the Supreme Being, and thereby easily misleads many honest and sincere persons." *Id.* at 144-145. It analyzes the income of the Roman Catholic hierarchy and announces that it is "the great racket, a racket that is greater than all other rackets combined." *Id.* at 178. It also says under the chapter heading "Song of the Harlot," "Referring now to the foregoing Scriptural definition of *harlot:* What religious system exactly fits the prophecies recorded in God's Word? There is but one answer, and that is: The Roman Catholic Church organization." *Id.* at 204-205. "Those close or nearby and dependent upon the main organization, being of the same stripe, picture the Jewish and Protestant clergy and other allies of the Hierarchy who tag along behind the Hierarchy at the present time

to do the bidding of the old whore". *Id.* at 222. "Says the prophet of Jehovah: 'It shall come to pass in that day, that Tyre (modern Tyre, the Roman Catholic Hierarchy organization) shall be forgotten.' Forgotten by whom? By her former illicit paramours who have committed fornication with her." *Id.* at 264. Throughout the literature statements of this kind appear amidst scriptural comment and prophecy, denunciation of demonology, which is used to characterize the Roman Catholic religion, criticism of government and those in authority, advocacy of obedience to the law of God instead of the law of man, and an interpretation of the law of God as they see it.

3. The spirit and temper of this campaign is most fairly stated perhaps in the words, again of Rutherford, in his book "Religion," p. 196-198:

"God's faithful servants go from house to house to bring His message of the kingdom to those who reside there, omitting none, not even the houses of the Roman Catholic Hierarchy, and there they give witness to the kingdom because they are commanded by the Most High to do so. They shall enter in at the windows like a thief. They do not loot nor break into the houses, but they set up their photographs before the doors and windows and send the message of the kingdom right into the houses into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the 'sourpusses' are compelled to hear. Locusts invade the homes of the people and even eat the varnish off the wood and eat the wood to some extent. Likewise God's faithful witnesses, likened unto locusts, get the kingdom message right into the house and they take the veneer off the religious things that are in that house, including candles and 'holy water', remove the superstition from the minds of the people, and show them that the doctrines that have been taught to them are wood, hay and stubble, destructible by fire, and they cannot withstand the heat. The people are enabled to learn that 'purgatory' is a bogeyman, set up by the agents of Satan to frighten the people into the religious organizations, where they may be fleeced of their hard-earned money. This the kingdom message plagues the religionists, and the clergy find that they are unable to prevent it. Therefore, as described by the prophet, the message comes to them like a thief that enters in at the windows, and this message is a warning to those who are of the visible that Jesus Christ has come, and they remember his warning words, to wit: 'Behold, I come as a thief.' (Revelation 16:15.) The day of Armageddon is very close, and that day comes upon the world in general like a thief in the night."

The day of Armageddon, to which all of this is prelude, is to be a violent and bloody one, for then shall be slain all "demonol

gists," including most of those who reject the teachings of Jehovah's Witnesses.

In the *Murdock* case, on another Sunday morning of the following Lent, we again find the Witnesses in Jeannette, travelling by twos and threes and carrying cases for the books and phonographs. This time eight were arrested, as against the 21 arrested on the preceding Palm Sunday involved in the *Douglas* case.

In the *Struthers* case we find the Witness knocking on the door of a total stranger at 1:00 on Sunday afternoon, July 7th. The householder's fourteen year old son answered, and, at the Witness's request, called his mother from the kitchen. His mother had previously become "very much disgusted about going to the door" to receive leaflets, particularly since another person had on a previous occasion called her to the door and told her, as she testified, "that I was doomed to go to hell because I would not let this literature in my home for my children to read." She testified that the Witness "shoved in the door" the circular being distributed,[2] and that she "couldn't do much more than take" it, and she promptly tore it up in the presence of the Witness, for while she believed "in the worship of God," she did not "care to talk to everybody" and did not "believe that anyone needs to be sent from door to door to tell us how to worship." The record in the *Struthers* case is even more sparse than that in the *Murdock* case, but the householder did testify that at the time she was given the circular the Witness "told me that a number of them were in jail and would I call the Chief of Police and ask that their workers might be released."

Such is the activity which it is claimed no public authority can either regulate or tax. This claim is substantially, if not quite,

---

[2] This reads as follows:

"RELIGION as a WORLD REMEDY. The Evidence in Support Thereof. Hear JUDGE RUTHERFORD, Sunday, July 28, 4 P. M., E. S. T. FREE, All Persons of Goodwill Welcome, FREE. Columbus Coliseum, Ohio State Fair Grounds." [on one side]

"1941's Event of Paramount Importance To You! What is it? The THEOCRATIC CONVENTION of JEHOVAH'S WITNESSES. Five Days—July 24-28—Thirty Cities. All Lovers of Righteousness—Welcome! The strange fate threatening all 'Christendom' makes it imperative that you COME and HEAR the public address on RELIGION AS A WORLD REMEDY, The Evidence in Support Thereof, by Judge Rutherford at the COLISEUM of the OHIO STATE FAIR GROUNDS, Columbus, Ohio, Sunday, July 28, at 4 p. m., E. S. T. 'He that hath an ear to hear' will come to one of the auditoriums of the convention cities listed below, tied in with Columbus by direct wire. Some of the 30 cities are [21 are listed]. For detailed information concerning these conventions write WATCHTOWER CONVENTION COMMITTEE, 117 Adams St., Brooklyn, N. Y." [on the other side]

sustained today. I dissent—a disagreement induced in no small part by the facts recited.

As individuals many of us would not find this activity seriously objectionable. The subject of the disputes involved may be a matter of indifference to our personal creeds. Moreover, we work in offices affording ample shelter from such importunities and live in homes where we do not personally answer such calls and bear the burden of turning away the unwelcome. But these observations do not hold true for all. The stubborn persistence of the officials of smaller communities in their efforts to regulate this conduct indicates a strongly held conviction that the Court's many decisions in this field are at odds with the realities of life in those communities where the householder himself drops whatever he may be doing to answer the summons to the door and is apt to have positive religious convictions of his own.[3]

Three subjects discussed in the opinions in *Murdock* v. *Pennsylvania* and *Martin* v. *Struthers* tend to obscure the effect of the decisions. The first of these relates to the form of the ordinances in question. One cannot determine whether this is mere makeweight or whether it is an argument addressed to the constitutionality of the ordinances; and whatever it is, I cannot reconcile the treatment of the subject by the two opinions. In *Murdock* the Court says "the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations," and again "the ordinance is not narrowly drawn to prevent or control abuses or evils arising from solicitation from house to house." It follows the recent tendency to invalidate ordinances in this general field that are not "narrowly drawn."

But in *Struthers* the ordinance is certainly narrowly drawn. Yet the Court denies the householder the narrow protection it gives. The city points out that this ordinance was narrowly drawn to meet a particular evil in that community where many men must work nights and rest by day. I had supposed that our question, except in respect to ordinances invalid on their face, is always whether the ordinance as applied denies constitutional rights. Nothing in the Constitution says or implies that real rights are more vulnerable to a narrow ordinance than to a broad one. I think our fane-

In the United States

[3] Compare Chafee, Freedom of Speech (1941) p. 407: "I cannot help wondering whether the Justices of the Supreme Court are quite aware of the effect of organized front door intrusions upon people who are not sheltered from zealots and impostors by a staff of servants or the locked entrance of an apartment house."

tion is to take municipal ordinances as they are construed by the state courts and applied by local authorities and to decide their constitutionality accordingly, rather than to undertake censoring their draftsmanship.

Secondly, in neither opinion does the Court give clear-cut consideration to the particular activities claimed to be entitled to constitutional immunity, but in one case blends with them conduct of others not in question, and in the other confuses with the rights in question here certain alleged rights of others which these petitioners are in no position to assert as their own.

In the *Murdock* case the Court decides to "restore to their high, constitutional position the liberties of itinerant evangelists." That it does without stating what those privileges are, beyond declaring that "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." How can we dispose of the questions in this case merely by citing the unquestioned right to minister to congregations voluntarily attending services?

Similarly, in the *Struthers* case the Court fails to deal with the behavior of the Witnesses on its own merits. It reaches its decision by weighing against the ordinance there in question not only the rights of the Witness but also "the right of the individual householder to determine whether he is willing to receive her message"; concludes that the ordinance "substitutes the judgment of the community for the judgment of the individual householder"; and decides the case on the basis that "it submits the distributer to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it." But the hospitable householder thus thrown in the balance with the Witness to make weight against the city ordinance is wholly hypothetical and the assumption is contrary to the evidence we have recited. Doubtless there exist fellow spirits who welcome these callers, but the issue here is what are the rights of those who do not and what is the right of the community to protect them in the exercise of their own faith in peace. That issue—the real issue—seems not to be dealt with.

Third, both opinions suggest that there are evils in this conduct that a municipality may do something about. But neither identifies it; nor lays down any workable guide in so doing. In *Murdock* the Court says that "the ordinance is not narrowly drawn to

prevent or control abuses or evils arising" from house-to-house solicitation. What evils or abuses? It is also said in *Murdock* that we "have something very different from a registration system under which those going from house to house are required to give their names, addresses and other marks of identification to the authorities." What more? The fee of course. But we are told the fee is not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." Is it implied that such a registration for such a fee would be valid? Wherein does the suggestion differ from the ordinance we are striking down? This ordinance did nothing more, it did not give discretion to refuse the license nor to censor the literature. The fee ranged from $1.50 a day for one day to less than a dollar a day for two weeks. There is not a syllable of evidence that this amount exceeds the cost to the community of policing this activity. If this suggestion of new devices is not illusory, why is the present ordinance invalid? The City of Struthers decided merely that one with no more business at a home than the delivery of advertising matter should not obtrude himself further by announcing the fact of delivery. He was free to make the distribution if he left the householder undisturbed, to take it up in his own time. The Court say the City has not even this much leeway in ordering its affairs, however complicated they may be as the result of round-the-clock industrial activity. If the local authorities must draw closer aim at evils than they did in these cases I doubt that they ever can hit them. What narrow area of regulation exists under these decisions? The *Struthers* opinion says, "the dangers of distribution can so easily be controlled by traditional legal methods." It suggests that the city may "by identification devices control the abuse of the privilege by criminals posing as canvassers." Of course to require registration and license is one of the few practical "identification devices." Merely giving one's name and his address to the authorities would afford them basis for investigating whether strange callers are and what their record has been. And that is what *Murdock* prohibits the city from asking. If the entire course of concerted conduct revealed to us is immune, I should think it neither fair nor wise to throw out to the cities encouragement to try new restraints. If some part of it passes the boundary of immunity, I think we should say what part and why in these cases we are denying the right to regulate it. The suggestion in *Struthers* that "the prob-

lem must be worked out by each community for itself" is somewhat ironical in view of the fate of the ordinances here involved.

Our difference of opinion cannot fairly be given the color of a disagreement as to whether the constitutional rights of Jehovah's Witnesses should be protected in so far as they are r ts. These Witnesses, in common with all others, have extensive rights to proselyte and propagandize. These of course include the right to oppose and criticize the Roman Catholic Church or any other denomination. These rights are; and should be held to be, as extensive as any orderly society can tolerate in religious disputation. The real question is where their rights end and the rights of others begin. The real task of determining the extent of their rights on balance with the rights of others is not met by pronouncement of general propositions with which there is no disagreement.

If we should strip these cases to the underlying questions, I find them too difficult as constitutional problems to be disposed of by a vague but fervent transcendentalism.

In my view the First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well. When limits are reached which such communications must observe, can one go farther under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology? I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups.

It may be asked why then does the First Amendment separately mention free exercise of religion? The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was an heretic and guilty of blasphemy because he failed to conform in mere belief or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure a greater license, that led to its separate statement.

The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal within the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a

minority to fix its limits. Civil government can not let any group ride roughshod over others simply because their "consciences" tell them to do so.

A common-sense test as to whether the Court has struck a proper balance of these rights is to ask what the effect would be if the right given to these Witnesses should be exercised by all sects and denominations. If each competing sect in the United States went after the householder by the same methods, I should think it intolerable. If a minority can put on this kind of drive in a community, what can a majority resorting to the same tactics do to individuals and minorities? Can we give to one sect a privilege that we could not give to all, merely in the hope that most of them will not resort to it? Religious freedom in the long run does not come from this kind of license to each sect to fix its own limits, but comes of hard-headed fixing of those limits by neutral authority with an eye to the widest freedom to proselyte compatible with the freedom of those subject to proselyting pressures.

I cannot accept the holding in the *Murdock* case that the behavior revealed here "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." To put them on the same constitutional plane seems to me to have a dangerous tendency towards discrediting religious freedom.

Neither can I think it an essential part of freedom that religious differences be aired in language that is obscene, abusive, or inciting to retaliation. We have held that a Jehovah's Witness may not call a public officer a "God damned racketeer" and a "damned Fascist," because that is to use "fighting words," and such are not privileged. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. How then can the Court today hold it a "high constitutional privilege" to go to homes, including those of devout Catholics on Palm Sunday morning, and thrust upon them literature calling their church a "whore" and their faith a "racket"?*

Nor am I convinced that we can have freedom of religion only by denying the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the market place and the street. For a stranger to corner a man in his home, summon

* Compare Valentine v. Chrestensen, 316 U. S. 52, permitting a ban on distribution of a handbill containing a civic appeal on one side and a commercial advertisement on the other.

him to the door and put him in the position either of arguing his religion or of ordering one of unknown disposition to leave is a questionable use of religious freedom.[5]

I find it impossible to believe that the *Struthers* case can be solved by reference to the statement that "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." I doubt if only the slothfully ignorant wish repose in their homes, or that the forefathers intended to open the door to such forced "enlightenment" as we have here.

In these cases, local authorities caught between the offended householders and the drive of the Witnesses, have been hard put to keep the peace of their communities. They have invoked old ordinances that are crude and clumsy for the purpose. I should think that the singular persistence of the turmoil about Jehovah's Witnesses, one which seems to result from the work of no other sect, would suggest to this Court a thorough examination of their methods to see if they impinge unduly on the rights of others. Instead of that the Court has, in one way after another, tied the hands of all local authority and made the aggressive methods of this group the law of the land.

This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone. The Court is adding a new privilege to override the rights of others to what has before been regarded as religious liberty. In so doing it needlessly creates a risk of discrediting a wise provision of our Constitution which protects all—those in homes as well as those out of them—in the peaceful, orderly practice of the religion of their choice but which gives no right to force it upon others.

Civil liberties had their origin and must find their ultimate guaranty in the faith of the people. If that faith should be lost, five or nine men in Washington could not long supply its want. Therefore we must do our utmost to make clear and easily understandable the reasons for deciding these cases as we do. Forthright observance of rights presupposes their forthright definition.

I think that the majority has failed in this duty. I therefore dissent in *Murdock* and *Struthers* and concur in the result in *Douglas*.

I join in the opinions of Mr. Justice REED in *Murdock* and *Struthers*, and in that of Mr. Justice FRANKFURTER in *Murdock*.

Mr. Justice FRANKFURTER joins in these views.

---

[5] See Chafee, *supra* footnote 3, pp. 406-407.